IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs January 30, 2008

KENNETH D. CROSS, JR., v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Cumberland County
No. 8246 Leon C. Burns, Jr., Judge

No. E2007-01200-CCA-R3-PC - Filed May 8, 2008

The petitioner, Kenneth D. Cross, Jr., pled guilty in the Cumberland County Criminal Court to aggravated vehicular homicide and received a sentence of twenty years. Thereafter, the petitioner filed a petition for post-conviction relief, alleging that his trial counsel was ineffective by failing to pursue a motion to suppress the results of a blood alcohol test that was taken without his consent and that his pleas were not knowingly and voluntarily entered. The post-conviction court denied the petition, and the petitioner now appeals. Upon review of the record and the parties' briefs, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which J. CURWOOD WITT, JR., and D. KELLY THOMAS, JR., JJ., joined.

Tom Beesley, Crossville, Tennessee, for the appellant, Kenneth D. Cross, Jr.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel West Harmon, Assistant Attorney General; Anthony J. Craighead, Interim District Attorney General; and Gary S. McKenzie, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

On September 15, 2004, the Cumberland County Grand Jury returned a multi-count indictment against the petitioner, charging him with vehicular homicide by intoxication; aggravated vehicular homicide; vehicular assault; driving under the influence (DUI); and DUI, fourth offense. On May 20, 2005, the petitioner pled guilty to aggravated vehicular homicide, a Class A felony, and he received a twenty-year sentence as a standard, Range I offender. The remainder of the charges were nollied.

At the plea hearing, the State recited the following factual basis for the plea:

> [O]n the 5th day of June 2004 a phone call came into the Crossville City Police that indicated that a vehicle, a van, a Ford full size van was traveling in the Peavine Road area and that it was weaving back and forth across the centerline of the road in a dangerous manner.
>
> City units were dispatched to respond to that area and upon arriving to that area the vehicle in question, the van was seen to be in an accident. At that point in time Officer Larry Qualls with the Crossville Police Department conducted an investigation in which he interviewed several witnesses to that accident. Those witnesses statements indicated that the van had turned onto Lantana Road and that it, in fact, was driving in an erratic manner and it crossed the center line and hit a vehicle, sideswiped one vehicle and then pushed head-on into another vehicle.
>
> The vehicle that it struck head-on, a passenger in that vehicle was a Karen Graham. She was critically injured on the scene of that accident, was taken to Cookeville Medical Center, at which she was pronounced dead on arrival.
>
> At that point in time there was suspicion of intoxication. Officer Qualls directed that the [petitioner], who was injured in the crash, was taken to CMC Medical Center . . . and blood was taken from the [petitioner].
>
> The blood was then sent to the TBI Lab and the results came back with a positive for alcohol in the amount of .11 over the legal limit.
>
> Several of the other witnesses also stated that they saw the [petitioner's] mannerisms before the accident, that he appeared to be under the influence of something.
>
> There is also statements from medical personnel as well as an officer that overheard the [petitioner] stating that he did, in fact, have consumed around eight beers that morning.

On March 23, 2006, the petitioner, acting pro se, filed a petition for post-conviction relief, alleging that his trial counsel was ineffective in failing to pursue a motion to suppress the results of the blood alcohol test and that his pleas were not knowingly and voluntarily entered. The petitioner contended that trial counsel should have attempted to have the blood alcohol test results suppressed

because petitioner could not and did not consent to having his blood drawn and tested at the hospital after the accident. Thereafter, post-conviction counsel was appointed and an amended petition was filed, acknowledging that trial counsel had filed a motion to suppress on May 5, 2005, before the petitioner entered his guilty plea. However, the amended petition contended that the

> motion ignores that two searches were conducted – the first when the blood was extracted and the second when the blood was analyzed. . . . [B]y not arguing the motion, counsel prevented the judge from having the discretion to rule that one or both of the searches and invasions of the petitioner's privacy violated constitutional law.

At the post-conviction hearing, the petitioner testified that he was injured in the crash which resulted in the victim's death, and he was taken to the hospital following the crash. He remained in the hospital for several weeks. He said that he was not arrested until September 29, 2004. Unable to make bond, the petitioner remained incarcerated while awaiting trial.

The petitioner said that trial counsel visited him only once in jail. The petitioner attempted to contact trial counsel via telephone. Trial counsel informed the petitioner that nothing was happening with the district attorney's office; therefore, there was no need for them to talk. The petitioner said that his mother brought trial counsel medical records reflecting that the petitioner had "blacking-out spells" which could have contributed to the crash. However, to his knowledge, trial counsel never investigated his medical condition.

The petitioner testified that in March 2005, he told trial counsel that he had been investigating his case in the law library, and he believed that they should pursue suppression of the blood alcohol test results because he had never consented to the drawing or testing of his blood. The petitioner testified that he had been unable to consent to testing; in fact, he did not recall anything from midnight the day before the crash until the time that he awoke in the hospital. Trial counsel told the petitioner that "there was nothing that we could do with the suppression motion. . . . It wouldn't help out." Trial counsel explained that even if the blood alcohol test results were suppressed, he could still be convicted if other witnesses said they smelled alcohol on the petitioner.

The petitioner recalled that his trial was scheduled to commence on May 27, 2005. On May 20, 2005, trial counsel told the petitioner about a plea agreement proposed by the State, requiring the petitioner to plead guilty to aggravated vehicular homicide in exchange for a twenty-year sentence with release eligibility after service of thirty percent of the sentence. The petitioner reiterated his desire for a motion to suppress the blood alcohol test results, and trial counsel again said that the suppression motion "wouldn't matter." The petitioner told trial counsel that he would accept a plea agreement providing for a fifteen-year sentence. Trial counsel advised the petitioner that the victim's family was pushing the State for a twenty-five year sentence. The petitioner recalled that trial counsel said that if he did not accept the twenty-year plea agreement, the trial court would "charge me with all the counts I was charged with, and I'd probably get the max on everything." The petitioner believed the maximum sentence he could have received was thirty-six or thirty-eight years.

The petitioner decided to accept the plea agreement providing for a twenty-year sentence. The plea was entered May 20, 2005. During the plea hearing, the petitioner first learned that trial counsel had filed a motion to suppress on May 5, 2005. The petitioner said that he did not know what his position would have been if he had pursued the motion to suppress and lost. He explained, "I've never been in this kind of trouble before. You know, I'd have to depend on legal counsel for all of the legal stuff that you need to understand." The petitioner asserted that he might have had options other than pleading guilty, but those options were not explored to his satisfaction by trial counsel.

On cross-examination, the petitioner acknowledged that his review of discovery materials made him aware that there were witnesses who would testify that the petitioner acted intoxicated, was awake, and was swerving the vehicle at the time of the crash. The petitioner also acknowledged that he had at least one prior felony conviction and prior DUI convictions.

The petitioner said that the trial court had advised him that by pleading guilty, he was forfeiting his motion to suppress. The petitioner explained that he did not stop the plea proceedings at that time because he was afraid of receiving a longer sentence. On cross-examination, the following colloquy occurred:

> [The State:] Okay. And you stated earlier, you would have taken fifteen (15) years; is that right?
>
> [The petitioner:] Yes, sir.
>
> [The State:] So, basically, we're here right now because of a five (5) year difference?
>
> [The petitioner:] Yes, sir. That, or less.

The petitioner stated that when faced with a longer sentence and a shorter sentence, "[y]ou don't have to be a genius to figure out which one you want."

The petitioner's trial counsel testified that on May 5, 2005, she filed a motion to suppress the blood alcohol test results. Prior to filing the motion, she and the petitioner discussed the motion to suppress. Trial counsel told the petitioner about the implied consent statute,[1] "explain[ing] it as best I could. Whether I explained it very well, or whether I explained it so that he could understand it, I don't know." Trial counsel acknowledged that the proof indicated that the petitioner's blood had been drawn solely for law enforcement purposes, not for a medical diagnosis. Trial counsel tried to explain to the petitioner that the blood alcohol test results would probably be admissible at trial. Trial counsel recalled discussing the petitioner's medical records, but she did not recall any "black-out issues."

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[1] See Tenn. Code Ann. § 55-10-406.

Trial counsel advised the petitioner that the State's proposal that the petitioner plead guilty to aggravated vehicular homicide with an accompanying twenty-year sentence would likely be the only offer he would receive, particularly considering that other people were injured in the crash and the petitioner had a past criminal history of one felony and several DUI convictions. Trial counsel advised the petitioner that if he proceeded to trial, he would likely be convicted and could face a sentence of twenty-five years for the aggravated vehicular homicide conviction. Trial counsel explained to the petitioner that there were enhancement factors which could be used to increase his sentence, but there were no mitigating factors to lessen the sentence. Trial counsel told the petitioner that he faced a possible total sentence of twenty-nine or thirty years if he were convicted of the other charged offenses and the sentences were run consecutively. Trial counsel maintained that she did not force the petitioner into a plea he did not want.

At the conclusion of the post-conviction hearing, the post-conviction court denied the petition, finding that the petitioner failed to prove that trial counsel was ineffective or that he was prejudiced by the alleged deficiency. On appeal, the petitioner challenges this ruling.

II. Analysis

To be successful in his claim for post-conviction relief, the petitioner must prove all factual allegations contained in his post-conviction petition by clear and convincing evidence. See Tenn. Code Ann. § 40-30-110(f) (2006). "'Clear and convincing evidence means evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.'" State v. Holder, 15 S.W.3d 905, 911 (Tenn. Crim. App. 1999) (quoting Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 n.3 (Tenn. 1992)). Issues regarding the credibility of witnesses, the weight and value to be accorded their testimony, and the factual questions raised by the evidence adduced at trial are to be resolved by the post-conviction court as the trier of fact. See Henley v. State, 960 S.W.2d 572, 579 (Tenn. 1997). Therefore, we afford the post-conviction court's findings of fact the weight of a jury verdict, with such findings being conclusive on appeal absent a showing that the evidence in the record preponderates against those findings. Id. at 578.

When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, "the petitioner bears the burden of proving both that counsel's performance was deficient and that the deficiency prejudiced the defense." Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)). To establish deficient performance, the petitioner must show that counsel's performance was below "the range of competence demanded of attorneys in criminal cases." Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). To establish prejudice, the petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. Notably,

> [b]ecause a petitioner must establish both prongs of the test, a failure to prove either deficiency or prejudice provides a sufficient

> basis to deny relief on the ineffective assistance claim. Indeed, a court need not address the components in any particular order or even address both if the [petitioner] makes an insufficient showing of one component.

Goad, 938 S.W.2d at 370 (citing Strickland, 466 U.S. at 697, 104 S. Ct. at 2069). Moreover, in the context of a guilty plea, "the petitioner must show 'prejudice' by demonstrating that, but for counsel's errors, he would not have pleaded guilty but would have insisted upon going to trial." Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998); see also Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 370 (1985).

On appeal, the petitioner raises two complaints. First, the petitioner argues that the post-conviction court "relied on a logical fallacy," i.e., the petitioner's statements at the plea hearing that his plea was an informed decision, in determining that the petitioner knowingly and voluntarily pled guilty. The petitioner contends the court ignored that his testimony at the post-conviction hearing was a "subsequent denial of such informed acquiescence." The petitioner maintains that "[a] better and more reasonable assumption would be that a person who has been continuously confined for eight months, with almost no contact with his attorney, should not be making any major decision about a lengthy prison term without at least the benefit of considering the issue overnight." Second, the petitioner argues that counsel should have filed and argued a motion to suppress the blood alcohol test results.

The post-conviction court found that there was no question of the petitioner's guilt; the petitioner's willingness to accept a fifteen-year sentence indicated the petitioner's responsibility for his involvement in the offense. The court noted that the petitioner accepted the twenty-year sentence to avoid the risk of receiving a greater sentence if and when convicted at trial. The court remarked that "it would not be unreasonable for this Court to believe, that even though you found yourself between a rock and a hard place, that you basically took the best deal you could get." Further, the court stated that although the petitioner received a longer sentence than he desired, "that's no prejudice to the extent that it would have caused you to plead guilty to something that you didn't want to plead guilty to."

At the post-conviction hearing, the petitioner did not complain that he had insufficient time to consider the plea agreement, nor did he raise that issue in his post-conviction petition. Thus, the petitioner's complaint that the post-conviction court relied on a "logical fallacy" is unfounded. See State v. Banes, 874 S.W.2d 73, 82 (Tenn. Crim. App. 1993) (explaining that a party is bound by the evidentiary theory argued to the trial court and may not change or add theories on appeal). Our review of the record reflects that the petitioner repeatedly assured the trial court at the plea hearing that he was aware of the terms of his plea and the rights he was waiving by pleading guilty, and he nevertheless wanted to enter a guilty plea. At the post-conviction hearing, the petitioner testified that he would have accepted a plea agreement providing for a fifteen-year sentence.

Moreover, at the post-conviction hearing, counsel for the petitioner stated, "I guess we can't

really argue whether or not the motion to suppress would have been successful or not. . . . The question is, had a motion been filed and argued, what position would [the petitioner] have taken regarding his guilty plea?" The proof at the post-conviction hearing reflects that if the petitioner had lost the motion to suppress, the State would have had substantial evidence against the petitioner in the form of blood alcohol test results. If the petitioner's motion to suppress had been successful, the State had witnesses who would testify that the petitioner smelled of alcohol, acted intoxicated, and drove erratically at or near the time of the crash. Thus, the State's case against the petitioner was strong, regardless of the outcome of the suppression motion. Further, our review of the plea hearing reflects that the petitioner informed the trial court that he was aware that by pleading guilty he was waiving his right to a motion to suppress. The petitioner entered his pleas to avoid a longer sentence, a valid reason for pleading guilty. We agree with the post-conviction court that the petitioner failed to prove by clear and convincing evidence that counsel was ineffective.

III. Conclusion

Based upon the foregoing, we affirm the judgment of the trial court.

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NORMA McGEE OGLE, JUDGE